

NO. 23808

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
BRUCE FRANK, Defendant-Appellant

APPEAL FROM THE THIRD CIRCUIT COURT
(CR. NO. 98-252K)

MEMORANDUM OPINION

(By: Burns, C.J., Watanabe and Foley, JJ.)

Defendant-Appellant Bruce Frank (Frank) appeals from the September 26, 2000, Judgment of the Circuit Court of the Third Circuit¹ (circuit court). A jury found Frank guilty of Count I, Manslaughter, in violation of Hawaii Revised Statutes (HRS) § 707-702 (1993 & Supp. 2001).² Frank had previously entered (on May 3, 1999) a no contest plea to Count II, Resisting

¹The Honorable Ronald Ibarra presided.

²Frank was originally charged with Murder in the Second Degree. The record does not indicate the statute for which Frank was convicted; however, the jury verdict dated July 5, 2000, found Frank guilty of Manslaughter By Reckless Conduct.

HRS § 707-702 provides, in pertinent part:

§707-702 Manslaughter. (1) A person commits the offense of manslaughter if:

(a) He recklessly causes the death of another person[.]

. . . .

(3) Manslaughter is a class A felony.

an Order to Stop a Motor Vehicle, in violation of HRS § 710-1027(1) (1993)³ and Count VII, Assault in the Third Degree, in violation of HRS § 707-712(1)(b) (1993).⁴ Frank was sentenced to a maximum term of imprisonment of twenty years for Count I and one year of imprisonment for each of Counts II and VII, all counts to run concurrently. Frank was ordered to pay \$3,447.00 in restitution to the victim's mother and \$4,095.98 to the Criminal Injuries Compensation Commission.

On appeal, Frank lists the following points of error: 1) the circuit court erred in denying Frank's Motion to Continue Pretrial Motions Deadline; 2) the circuit court erred in denying Frank's motion to suppress his statements; 3) the circuit court erred in allowing photographs of the victim's battered body into evidence; 4) the circuit court erred in allowing the State to use

³HRS § 710-1027(1) provides:

§710-1027 Resisting an order to stop a motor vehicle. (1) A person commits the offense of resisting an order to stop a motor vehicle if the person intentionally fails to obey a direction of a peace officer, acting under color of the peace officer's official authority, to stop the person's vehicle.

⁴On May 3, 1999, Frank entered a no contest plea to HRS § 707-712(1)(b). However, the September 26, 2000, Judgment states that Frank pled to HRS § 707-712(1)(a). As this issue is not before the court, we will not comment on it except to say that counsel and the court should carefully read judgments.

HRS § 707-712(1) provides:

§707-712 Assault in the third degree. (1) A person commits the offense of assault in the third degree if the person:

- (a) Intentionally, knowingly, or recklessly causes bodily injury to another person; or
- (b) Negligently causes bodily injury to another person with a dangerous instrument.

conclusive and argumentative language; and 5) the jury instructions were misleading as to use of deadly force.

Frank's points of error are without merit. The September 26, 2000, Judgment of the circuit court is affirmed.

I. BACKGROUND

The following evidence was adduced at trial. On November 6, 1998, Frank spent the afternoon at Pahoehoe Beach with Jennifer Malvey (Malvey) and several other friends. After Malvey finished work as a waitress at Don Drysdale's Two that evening, Frank and Malvey went to the Other Side Bar (Bar) at approximately 1:45 a.m. on November 7, 1998. Frank and Malvey were intoxicated. Frank and Malvey left the Bar together at approximately 4 a.m. Frank briefly returned to the Bar to retrieve some beer at approximately 5:00 a.m.

Malvey worked at the Bar as a bartender, and Frank worked for the Bar as a maintenance man. The Bar's owner, Leroy Dickinson (Dickinson), allowed Frank and Malvey to live in a room in the back office space above the Bar (back office room).

At trial, Frank testified to the following. On the early morning of November 7, 1998, Frank and Malvey were in the back office room drinking and playing darts. They started arguing about a comment Frank made regarding Malvey's conduct when they were in the Bar. Malvey threw a dart at Frank, and Frank jumped out of the way. Malvey then threw a beer bottle

that Frank blocked with his wrist. Malvey clawed Frank's face, and Frank "backhanded" her. Frank attempted to leave, and Frank and Malvey started yelling back and forth. Malvey threw a beer bottle at Frank, who picked it up and threw it behind Malvey. During a scuffle, Malvey landed on top of Frank, and Frank kicked Malvey in the buttocks to get her off. Malvey threw a broom that hit Frank under his navel.

Frank testified he went to his van in the parking lot but could not find the keys, so he returned to the back office room. Frank and Malvey began arguing again, and Malvey hit Frank with a lamp. Frank punched Malvey, and she hit him with a beer bottle. Frank hit Malvey again, they fell over, and Frank landed on top of her. Frank noticed that Malvey's eyes seemed glossed and her breathing was rough. Black blood gushed from Malvey's face, and she started making a growling sound. Frank hit Malvey with a small table to make her unconscious. Frank tried to muffle the growling sound with a shirt. Frank choked Malvey to death because Frank knew from the black blood that she was dying and he did not want her to suffer. Frank got dizzy and fell over, and awoke in daylight. Frank considered killing himself with a knife.

Frank testified that he is responsible for Malvey's death, but did not intend to cause her death. He acted in self-defense and that "my thinking was to get her to stop. I was trying to calm her down most of the time."

Michael Wiley (Wiley), a maintenance worker employed by the Bar, testified as follows. On November 7, 1998, at approximately 11:00 a.m., Wiley went to the Bar to work. Dickinson was at the Bar cleaning; he said they could not wake Frank. Wiley went upstairs looking for Frank. A note stating "Do Not Disturb" was taped to the back office room door, which was locked from the inside. Wiley used a ladder to gain access to the back office room and saw the lower part of a body lying on the floor. Wiley did not move Malvey's body at any time.

Dickinson (owner of the Bar) testified that on the morning of November 7, 1998, he stopped by the Bar on his way to the beach and discovered that the morning maintenance had not been done. Dickinson went upstairs to the back office room to wake Frank to do the cleaning. The back office is located on the second floor, and the stairs to reach the back office are on the side of the building behind a locked door. There was a note on the back office room door that said "Do not disturb. We're sleeping." Dickinson pounded on the door, but got no response. Dickinson and Wiley got a ladder, placed it on the back side of the of the building, and Wiley gained access to the back office

room through a window. Dickinson later identified the body found in the back office room as Malvey.

Dr. Anthony Manoukian (Manoukian) testified that Malvey's death was caused by multiple blunt force traumatic injuries. Malvey was hit repeatedly with a blunt object on her head, chest, abdomen, arms, knees, buttocks and part of her back while she was alive. The injuries to the head are most likely the injuries that caused Malvey to become incapacitated. Near or after the time of her death, Malvey also received three blows to her left frontal scalp and a four-centimeter laceration to the liver.

Angela Natali (Natali), an employee at Stockly's Aquarium next to the Bar, saw Frank walk across the street in front of the Bar at approximately 9:00 a.m. on November 7, 1998. A little later Natalie saw a red truck she believes was driven by Frank go by the store and leave the area.

Dan Wheatley (Wheatley), a Bar employee and roommate of Dickinson, testified that Frank left a message on Wheatley's home answering machine at about 12:26 p.m. on November 7, 1998. Wheatley testified the message was as follows: "Bruno here. I've got about twenty seconds to say this. This Panama thing is coming down on me, man. I told you November. It's here. Ah, fuck. I killed Jen last night. I did it. Me. I had to."

Police Officer Jeremie Evangelista (Evangelista) testified that on November 8, 1998, an all-points bulletin had been issued for a red Nissan pickup truck with a missing tailgate. On November 8, 1998, Evangelista identified the suspect vehicle and attempted a traffic stop in Waimea town. The suspect vehicle speeded up, veered into the left lane to pass traffic stopped for a red light, and then returned to the right lane while in the intersection. The suspect vehicle continued on, straddling the center lane, then veered straight for a white Ford Bronco traveling in the opposite direction and collided with the Bronco. Evangelista and Officer Robert Newcomb pulled Frank from the suspect vehicle. Frank was arrested at 10:47 a.m. and was transported to North Hawai'i Community Hospital. Frank was treated at the hospital and was transported to the Kona Police Station later that same day.

Detective Albert Pacheco testified that he assisted in Frank's arrest and that at approximately 1:45 p.m., while in the hospital, Frank asked him, "Is my girlfriend dead? Is my girlfriend dead?"

Deborah Carr Henry (Henry), a nurse at North Hawai'i Community Hospital, testified that Frank arrived at the hospital on November 8, 1998, at approximately 11:15 a.m. Frank was oriented as to person, place and time. At approximately

12:30 p.m. while Henry was asking him treatment questions, Frank stated to her, "I killed my girlfriend."

On November 8, 1998, Evangelista signed an affidavit stating he had probable cause to believe Frank committed the offense of murder on November 7, 1998. Attached to Evangelista's affidavit was the arrest report, which stated:

DESCRIBE PROBABLE CAUSE

On [November 8, 1998] on Rte 19 and the intersection of Kinohou St in Waimea, County and State of Hawaii, [Frank] was arrested for the offense of MURDER II, HRS 707-705-1 re:APB 981225, that on 11-7-98 at approximately 1116 hrs., the badly beaten body of Jennifer Jean MALVEY was found in an office above the OTHER SIDE BAR in Kailua-Kona Old Industrial Area. That [Frank] and victim were spending the night together in the office where the victims [sic] body was found. MALVEY was last seen alive with [Frank] at approximately 0400 hrs on 11-07-98 in the area of the Other Side Bar, that on 11-07-98 at 0900 [Frank] was seen outside of the office where the victims [sic] body was found. On 11-07-98 at approximately 1213 hrs, a party identifying himself as FRANK left a message on his employers [sic] machine stating he had killed MALVEY.

Detective Wayne Young (Young) testified that on the morning of November 9, 1998, Frank stated to Young, "do sturgeons eat their eggs?" Young was aware that Frank had been under observation for "some time" at the police station for head injuries and Frank's sleep had been interrupted during the night as part of the head injury precaution.

Justin Yamamoto (Yamamoto), a fire rescue specialist with the Hawai'i County Fire Department, testified that he awakened Frank twice during the night of November 8-9 to take vital signs and check Frank over. Young believes that Frank had

been given prescriptive Tylenol with codeine at the time Young examined Frank.

Captain John Dawrs (Dawrs) testified that on November 9, 1998, he and Young interviewed Frank at the Kealahou Police Station. Dawrs assisted Young in administering the Advice of Rights form used by the Hawai'i County Police Department to Frank. In response to Young's question, "Do you want a lawyer now?," Frank answered "Nah, I do, but nah, that's okay." Young clarified by asking, "So -- so, no, you don't?," and Frank responded, "No. The only reason I said I did because I'm going to have to get one eventually so I'll just wait." Frank signed the Advice of Rights form. Frank was interviewed for approximately two hours, from 11:23 a.m. to 1:20 p.m.

Young testified he advised Frank of his rights a second time on November 9, 1998, at 7:23 p.m., by reading verbatim the Advice of Rights form. Frank signed the form. Young had concerns about the accuracy or reliability of Frank's statements regarding Malvey's injuries in comparison to the physical evidence.

Christopher King, M.D., the emergency room doctor who treated Frank, testified that at the time of his arrest, Frank had injuries to his head and upper chest consistent with being in a motor vehicle accident. Frank had a mild concussion.

On November 10, 1998, a complaint was filed against Frank in the District Court of the Third Division, North and South Kona Division. The complaint stated as follows:

COUNT I (F-76948/KN)

On or about the 7th day of November, 1998, in Kona, County and State of Hawaii, BRUCE FRANK intentionally or knowingly caused the death of another person, JENNIFER JEAN MALVEY, thereby committing the offense of Murder in the Second Degree, in violation of Section 707-701.5(1), Hawaii Revised Statutes, as amended.

COUNT II (F-76917/SK)

On or about the 8th day of November, 1998, in South Kohala, County and State of Hawaii, BRUCE FRANK intentionally failed to obey a direction of Officer Albert Pacheco, a peace officer acting under color of his official authority, to stop his vehicle, thereby committing the offense of Resisting an Order to Stop a Motor Vehicle, in violation of Section 710-1027(1), Hawaii Revised Statutes, as amended.

COUNT III (F-76918/SK)

On or about the 8th day of November, 1998, in South Kohala, County and State of Hawaii, BRUCE FRANK, while driving a vehicle on a roadway of sufficient width, did fail to drive upon the right half of the roadway, thereby committing the offense of Failure to Drive on Right Side of Roadway, in violation of Section 291C-41, Hawaii Revised Statutes, as amended.

COUNT IV (F-76919/SK)

On or about the 8th day of November, 1998, in South Kohala, County and State of Hawaii, BRUCE FRANK did operate a motor vehicle of a category listed in Section 286-102 of the Hawaii Revised Statutes, without being appropriately examined and duly licensed as a qualified driver of that category of motor vehicles, thereby committing the offense of Driving Without a License, in violation of Section 286-102(a), Hawaii Revised Statutes, as amended.

COUNT V (F-76920/SK)

On or about the 8th day of November, 1998, in South Kohala, County and State of Hawaii, BRUCE FRANK operated or used a motor vehicle upon a public street, road or highway of this State at a time when such motor vehicle was not insured under a no-fault policy, thereby committing the offense of Conditions of Operation and Registration of Motor Vehicles, commonly referred to as No No-Fault Insurance, in violation of Section 431:10C-104(a), Hawaii Revised Statutes, as amended.

COUNT VI (F-____/SK, [F-76917/SK])

On or about the 8th day of November, 1998, in South Kohala, County and State of Hawaii, BRUCE FRANK did operate

a motor vehicle recklessly in disregard of the safety of persons or property, thereby committing the offense of Reckless Driving of Vehicle, in violation of Section 291-2, Hawaii Revised Statutes, as amended.

COUNT VII (F-_____/SK, [F-76917/SK])

On or about the 8th day of November, 1998, in South Kohala, County and State of Hawaii, BRUCE FRANK, intentionally, knowingly or recklessly caused bodily injury to another person, SANDY SUGIYAMA, and/or negligently caused bodily injury to SANDY SUGIYAMA with a dangerous instrument, thereby committing the offense of Assault in the Third Degree, in violation of Section 707-712(1)(a), Hawaii Revised Statutes, as amended.

The State filed its Motion to Determine Voluntariness of Defendant's Statements (State's Voluntariness Motion) on January 14, 1999. The State sought to determine the voluntariness of: Frank's statements made at North Hawai'i Community Hospital on November 8, 1998, to Henry ("I killed my girlfriend") and to Detective Pacheco ("Is my girlfriend dead?"); Frank's statements made to Detectives Young and Dawrs on November 9 and 10, 1998; a message left on Daniel Wheatley's answering machine on November 7, 1998; and items found pursuant to a vehicle search. A hearing on the State's Voluntariness Motion was held on February, 22, 1999. The circuit court found that Frank's statements were voluntary. In its conclusions of law filed March 25, 1999, the circuit court found the following:

1. [Frank] was in custody;
2. [Frank] was advised of his constitutional rights under Miranda v. Arizona and the Hawaii Supreme Court cases;
3. As to the tape recorded statements, the Court finds under State v. Hoey, 77 Haw. 17, 881 P.2d 504 (1994), [Frank] made an ambiguous request for counsel. Upon clarification, [Frank] voluntarily, knowingly, and intelligently waived the presence of counsel;
4. As to the second interview, [Frank] knowingly, voluntarily, and intelligently waived his constitutional rights; and

5. [Frank] voluntarily made statements to Detective Wayne Young and Captain John Dawrs.

In its conclusions of law filed May 26, 1999, the circuit court found the following:

- A. Statements to Daniel Wheatley
 - 1. Statements left on the answering machine were voluntarily made and not in response to any questioning.
- B. Statements to South Kohala Police Officers
 - 1. The physician/patient privilege does not apply.
 - 2. These statements were voluntarily made.
- C. Statements to Debra Carr [Henry]
 - 1. The physician/patient privilege does not apply as the statement made by [Frank] was not in response to Nurse [Henry]'s question regarding treatment and diagnosis.
 - 2. The statement was voluntarily made by [Frank].

On May 3, 1999, Frank entered a no contest plea to Count II, Resisting an Order to Stop a Motor Vehicle; and Count VII, Assault in the Third Degree. In exchange, the State dismissed Counts III through VI on May 21, 1999.

On February 23, 2000, Frank filed a Motion to Continue Pretrial Motions Deadline, which had expired on August 19, 1999. Frank sought to extend the pretrial motions deadline in order to file a motion to suppress the statements Frank made pursuant to his interrogation on November 9, 1998. The circuit court had previously determined Frank's statements to be voluntary in its Findings of Fact, Conclusions of Law and Order Granting State's Motion to Determine Voluntariness of Defendant's Statements filed on March 25, 1999. Frank intended to base his motion to suppress on the Hawai'i Supreme Court's decision in State v. Gella, 92 Hawai'i 135, 988 P.2d 200 (1999), which addressed the effects of sleep deprivation and drug intoxication on a suspect's waiver of

the right to counsel. Gella had been published after the circuit court's ruling on the State's Voluntariness Motion.

The hearing on Frank's Motion to Continue was held March 10, 2000. In denying the motion at the hearing, the court stated:

THE COURT: I'll review the transcript [of the February 22, 1999 hearing on the State's Voluntariness Motion] because the voluntariness certainly involves all the totality of the circumstances. And the Court will not revisit and have another evidentiary hearing. And I'm going to deny your motion but, however, I will construe this -- I'll deny your motion to continue pretrial motions deadline, however, I will take this opportunity to review the transcript in light of the Gella case.

On March 12, 2000, the circuit court issued its Order Denying Motion to Continue Pretrial Motions Deadline. The circuit court ordered Frank and the State to submit written arguments on voluntariness in light of Gella.

Frank filed his Motion to Suppress Statements on March 13, 2000, arguing that "the Court made neither findings nor conclusions in any way pertaining to the effects of sleep deprivation and/or drugs administered to Defendant FRANK while he was in police custody[,] thus, "[t]here is no law of the case to preclude this motion."

On April 19, 2000, the circuit court denied Frank's Motion to Suppress Statements. The circuit court's order stated that "[t]he Findings of Fact, Conclusions of Law and Order Granting State's Motion to Determine Voluntariness of Defendant's

Statements filed on March 25, 1999 and May 26, 1999 are incorporated and included as the Court's findings in this case."

On May 17, 2000, Frank filed his Motion in Limine VI. This motion sought to exclude all photographic and/or videotaped evidence depicting Malvey's remains. Frank argued in Motion in Limine VI:

Investigating police officers in this case preserved by photographs and videotape portions of the autopsy, including removal and inspection of decedent's brain as well as examination of wounds to her head, but did not record or preserve documentation of potentially exculpatory evidence consisting of the absence of blood in her body cavity despite a 4 centimeter laceration of her liver, which, combined with other evidence including the stone-like fragment, suggests that her heart had stopped beating before the head wounds occurred.

Frank further argued that "[t]he sole issue upon which photographs and videotape of the decedent's remains are relevant is cause of death." The State countered that it intended to introduce the photographs in order to depict the severity of Malvey's injuries and to assist Manoukian in his explanation regarding the cause of her death.

At a hearing on June 2, 2000, the circuit court denied Frank's Motion in Limine VI without prejudice, stating that "each exhibit [photograph/videotape] will be ruled [on] individually at the time of admission" at trial. The circuit court entered its written Order Denying Motion in Limine VI on June 15, 2000.

On June 6, 2000, Frank filed his Motion to Reconsider Defendant's Motion in Limine VI (Motion to Reconsider). Frank argued:

[T]he defense believes that the unavailable documentary evidence is not so critical as to render trial unfair unless the State is allowed to use photographic evidence which, in the absence of the unavailable exculpatory evidence, is misleading, and which, moreover, is unduly inflammatory and prejudicial. Use of photographs of Decedent Malvey selected by the State for the purpose of proving murder, but which instead depict injuries that likely may have occurred either after she was dead or from causes other than the altercation that culminated in her death, in the absence of highly probative documentary evidence favorable to the defense, is so fundamentally unfair that it violates due process.

(Emphasis in original.)

The hearing on Frank's Motion to Reconsider was held on June 19, 2000. At the hearing, Frank examined Manoukian in an attempt to establish that Malvey had enough alcohol and cocaine in her system to, without any other influence, kill an adult human. Manoukian testified at the hearing that it was his belief that the amount of alcohol and cocaine in Malvey's body was not fatal. Manoukian testified that the injuries to Malvey's liver and the lacerations to her left scalp occurred during the perimortem period ("at or about the time or perhaps even slightly just after the person has died"). Manoukian stated that the scalp injuries "were relatively insignificant in [Malvey's] death."

On June 21, 2000, the circuit court issued its Order Denying Motion to Reconsider Defendant's Motion in Limine VI, finding that "the probative value outweighs any prejudicial effects."

On May 30, 2000, Frank filed his Motion in Limine VII, seeking an order to preclude the State from using conclusive and

prejudicial language, such as "victim" to refer to Malvey and "homicide" or "killing" to refer to Malvey's death. The circuit court denied Motion in Limine VII by written Order Denying Motion in Limine VII filed on June 15, 2000.

Trial began on June 21, 2000. The jury filed its verdict convicting Frank of Manslaughter By Reckless Conduct on July 5, 2000.

II. STANDARD OF REVIEW

A. Ruling on Motions

"Decisions relating to the conduct of a trial or hearing and the adequacy of process usually involve the exercise of discretion, and thus warrant review under the abuse of discretion standard on appeal." State v. Ross, 89 Hawai'i 371, 375, 974 P.2d 11, 15 (1998).

B. Voluntariness of Statements

We apply a *de novo* standard of appellate review to the ultimate issue of the voluntariness of a confession. We thus examine the entire record and make an independent determination of the ultimate issue of voluntariness based upon that review and the totality of the circumstances surrounding the defendant's statement.

. . . .

Our review of whether a defendant's statement was in fact coerced requires determination of whether the findings of the trial court are clearly erroneous. A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been committed.

Gella, 92 Hawai'i at 142, 988 P.2d at 207 (internal quotation marks and brackets omitted).

C. Admissibility of Evidence

We apply two different standards of review in addressing evidentiary issues. Evidentiary rulings are reviewed for abuse of discretion, unless application of the rule admits of only one correct result, in which case review is under the right/wrong standard.

State v. Ortiz, 91 Hawai'i 181, 189, 981 P.2d 1127, 1135 (1999) An abuse of discretion occurs if the trial court has clearly exceeded the bounds of reason or has disregarded rules or principles of law or practice to the substantial detriment of a party litigant.

State v. Culkin, 97 Hawai'i 206, 213, 35 P.3d 233, 240 (2001)

(internal quotation marks omitted).

D. Jury Instructions

When jury instructions or the omission thereof are at issue on appeal, the standard of review is whether, when read and considered as a whole, the instructions given are prejudicially insufficient, erroneous, inconsistent, or misleading.

Erroneous instructions are presumptively harmful and are a ground for reversal unless it affirmatively appears from the record as a whole that the error was not prejudicial.

Error is not to be viewed in isolation and considered purely in the abstract. It must be examined in the light of the entire proceedings and given the effect which the whole record shows it to be entitled. In that context, the real question becomes whether there is a reasonable possibility that error may have contributed to conviction. If there is such a reasonable possibility in a criminal case, then the error is not harmless beyond a reasonable doubt, and the judgment of conviction on which it may have been based must be set aside.

Id. (quoting State v. Gomes, 93 Hawai'i 13, 18, 995 P.2d 314, 319 (2000)).

III. DISCUSSION

A. Motion to Continue Pretrial Motions and Voluntariness of Frank's Confession

Frank contends the circuit court erred in denying his Motion to Continue Pretrial Motions because the burden in holding an evidentiary hearing on the voluntariness of Frank's confession is outweighed by the risk of admitting an involuntary confession.

It is an established constitutional rule that "a trial judge must make a threshold determination of the voluntariness of a confession before the jury may consider it." State v. Goers, 61 Hawai'i 198, 199-200, 600 P.2d 1142, 1143 (1979). Goers held:

[A] motion for a voluntariness hearing with regard to a confession may be brought at any time prior to the admission of the confession into evidence. . . . The burden of holding such a hearing is outweighed by the risk of admitting an involuntary confession that results in a conviction, a clear violation of the defendant's due process rights.

Id. at 201, 600 P.2d at 1144.

In this case, a hearing on the voluntariness of Frank's confession was held on February 22, 1999, at which Frank testified to the circumstances surrounding the night prior to his interrogation. After the pretrial motions deadline, Frank sought to have a second voluntariness hearing in light of the Hawai'i Supreme Court's holding in Gella.

At the March 10, 2000, hearing on the Motion to Continue Pretrial Motions Deadline, the following colloquy ensued:

THE COURT: And the Court is very much concerned that a case such as this be moved along in the criminal justice system expeditiously.

[DEFENSE COUNSEL]: I totally agree, your Honor, but I think the question of whether his confession, which we assert was not lawfully obtained, is admissible before a jury in a murder trial. It really has to be more important.

THE COURT: Well, why did it take you so long to file this motion?

[DEFENSE COUNSEL]: Because I didn't have the cases to support it. I didn't have a good faith basis to come before this Court and say that I had law to support my position.

THE COURT: But you had facts.

[DEFENSE COUNSEL]: I had facts, but I didn't have the law.

THE COURT: And facts go to voluntariness.

[DEFENSE COUNSEL]: And the Court had already made a decision.

THE COURT: On the facts that was [sic] presented that you state -- the facts that you had, were presented at the Motion to Determine Voluntariness.

[DEFENSE COUNSEL]: They were presented.

THE COURT: So all the Court needs to do then is look at transcripts, and based on the law, you're asking the Court to reconsider because of the State vs. Gella case, no need for a new hearing.

[DEFENSE COUNSEL]: Well, that's -- I would simply say that given an opportunity by the Court, we would develop the facts more than they were developed at that hearing. For instance, Mr. Frank testified at the hearing that he was having weird thoughts. I would ask him to specify what those weird thoughts were. And your Honor, we respectfully submit or we just sat here through a change of plea hearing, and as in every change of plea hearing, the Court asks the defendant whether he's had any drugs or alcohol in the prior 24 hours and we submit that if the answer were "Yeah, I was administered codeine every two hours and I was awakened unable to sleep because of the administration of this codeine," then there wouldn't be any point in answering the question if the change of plea could be determined to be voluntary.

While the circuit court denied Frank's Motion to Continue Pretrial Motions Deadline, it entertained Frank's non-hearing Motion to Suppress Statements, filed after the pretrial motions deadline. In his March 13, 2000, Motion to Suppress Statements, Frank presented the applicable law on the issues of custodial sleep deprivation and custodial administration of narcotics. The circuit court did not deny Frank the opportunity to present either law or facts regarding Frank's state of mind at the time of his confession, and did not abuse its discretion in refusing to extend the pretrial motions deadline to allow Frank a second evidentiary hearing.

B. Motion to Suppress

Frank contends he could not have knowingly and intelligently waived his privilege against self-incrimination and his right to counsel on November 9, 1998, because on the night of November 8, 1998, Frank was repeatedly awakened and was administered Tylenol with codeine.

In Gella, the Hawai'i Supreme Court found Gella's statement to be voluntary under the totality of the circumstances where Gella feared he would be beaten, felt dizzy and in pain, and had not slept for four days prior to his arrest. Gella, 92 Hawai'i at 140 & 142, 988 P.2d at 205 & 207. Gella did not depart from the requirement that the appellate court review the totality of the circumstances in determining the voluntariness of

the statement, nor did it articulate "a new analysis of intoxication and sleep deprivation."

A defendant's mental and physical condition can be part of the "totality of circumstances" relevant to the issue of the voluntariness of his or her custodial statements. However, in the absence of insanity or mental depletion, neither the voluntary character nor the admissibility of a confession is affected by the mental instability of the person making it.

State v. Kelekolio, 74 Hawai'i 479, 503, 849 P.2d 58, 69-70

(1993) (internal quotation marks and citations omitted). The test is whether the confession is a "product of any impermissible scheme on the part of the police to lower [defendant's] resistance or render him susceptible to improper suggestion." Id. at 504, 849 P.2d at 70.

In its April 19, 2000, Order Denying Defendant's Motion to Suppress Statements, the circuit court incorporated the following Findings of Fact filed March 25, 1999:

15. [Frank] understood his rights, did not want a lawyer, and he did not request a lawyer during both interviews;

16. [Frank] was not promised or threatened prior to making his statements; and

17. [Frank] knowingly, voluntarily, and intelligently waived his constitutional rights.

"We accept the factual findings underlying a lower court's determination regarding the voluntariness of a confession unless they are clearly erroneous." Gella, 92 Hawai'i at 144, 988 P.2d at 209.

At the February 22, 1999, hearing on the State's Voluntariness Motion, Detective Young testified that Frank

arrived at the Kealahou Police Station on November 8, 1998, with a head injury sustained in an accident. Upon Frank's release from the hospital, Frank was given a "head injury precaution sheet," which required that Frank be checked at intervals. Young arranged for fire rescue to check Frank's blood pressure at intervals during the evening. The final check was made by Young, who went to Frank's cell block and asked Frank if he was all right. Frank told Young that he was feeling alright, but he had awakened asking the question, "Do sturgeons eat their eggs?" Young did not believe Frank's statement was relevant to Frank's physical well-being. Young testified that when Frank was escorted to the interview room, he walked slowly and was in obvious discomfort.

Young testified that he reviewed the Miranda rights with Frank prior to the first interview. Frank's response to the question, "Do you want a lawyer now?" was "Nah, I do but nah that's okay." Young clarified by asking, "So, so no you don't . . . want a lawyer?", and Frank responded with, "I, the only reason I said I did was 'cause I gonna have to get one eventually. So I'll just wait." Frank signed an Advice of Rights form on November 9, 1998, at 11:23 a.m.; again on November 9, 1998, at 7:23 p.m.; and again on November 10, 1998, at 7:51 a.m. Young testified that during the interview, Frank did not complain of any pain, nor ask to take a break.

Frank testified that the hospital had prescribed Tylenol with codeine that was administered at the police station and the medication did not affect the pain but made him sleepy. The medical checks at the police station had interfered with Frank's sleeping. Frank testified he did not think the pain had interfered with his ability to think, but his mind was "scrambled" at the time the interview commenced. Frank did not remember whether he complained of pain during the interview, but stated, "I was probably moaning and grumbling the whole time because it did hurt bad."

We conclude that Frank's sleepiness, pain and medication did not interfere with the voluntariness of Frank's statement.

C. Admissibility of Evidence

1. Frank's Motion in Limine VI

Frank contends that the State's use of photographs of Malvey's remains was unduly prejudicial because the photographs were not probative of Malvey's cause of death and the State did not preserve exculpatory photographs.

a. The probative value of the photographs.

"The test for determining whether photographs may be shown to the jury is not whether they are necessary, but whether their probative value outweighs their possible prejudicial

effect." State v. Brantley, 84 Hawai'i 112, 118, 929 P.2d 1362, 1368 (App. 1996) (internal quotation marks omitted).

The responsibility for maintaining the delicate balance between the probative value and prejudicial effect lies largely within the discretion of the trial court. Moreover, the admission or rejection of photographs is a matter within the discretion of the trial court; consequently, unless there is a showing of an abuse of discretion, the trial court's ruling will not be disturbed on appeal.

Id. (internal quotation marks and citation omitted).

In Brantley, this court held that the trial court did not abuse its discretion in admitting autopsy pictures, including pictures of wounds not responsible for the victim's death. Id. at 120-21, 929 P.2d at 1370-71. The pictures were found to be relevant to the defendant's state of mind. We further reasoned that because "the prosecution must prove every element of its case beyond a reasonable doubt, we believe that the photographs submitted properly painted a complete picture of the victim when found." Id. at 121, 929 P.2d at 1371 (internal quotation marks, citation, and brackets omitted).

At trial, Manoukian testified that Malvey died of multiple blunt force traumatic injuries, and that Malvey was hit repeatedly with a blunt object on her head, chest, abdomen, arms, knees, buttocks, and part of her back while she was alive. The photographs offered by the State depicted the injuries to Malvey's eyes, nose, lower and upper lips, neck, chest, breast, right and left sides, abdomen, right and left arms, left knee, back, and buttocks.

The circuit court did not abuse its discretion in admitting photographs probative of Malvey's cause of death.

b. The exculpatory value of unavailable photographs.

Citing State v. Matafeo, 71 Haw. 183, 787 P.2d 671 (1990), Frank claims the State's failure to preserve photographs of Malvey's jaw, liver, and brain precluded Frank from showing how Frank acted in self-defense. In Matafeo, the Hawai'i Supreme Court applied the Brady⁵ rule in holding there was no "showing that the [destroyed] evidence would create a reasonable doubt about the Appellant's guilt that would not otherwise exist." 71 Haw. at 186, 787 P.2d at 673 (internal quotation marks and brackets omitted).

Similarly, Frank has failed to show in this case how pictures of Malvey's jaw, liver, or brain would be material to the issue of self-defense. Frank contends that the photographs were offered for the purpose of proving murder, but "instead depicted gruesome injuries that occurred after the decedent could not have survived, in the absence of photographic evidence

⁵ In Brady v. Maryland, [373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963),] the United States Supreme Court held that the suppression by the prosecution of evidence favorable to the accused violates due process where the evidence is material to guilt or punishment, regardless of the good faith or bad faith of the prosecution. 373 U.S. at 87, 10 L. Ed. at 218, 83 S. Ct. at 1196[-97]. The Brady rule has been incorporated into the Hawaii due process jurisprudence and relied upon frequently by this court.

Matafeo, 71 Haw. at 185-86, 787 P.2d at 672.

proving that decedent was dead when the most severe wounds depicted in police photographs occurred." The fact that Malvey was dead when the most severe wounds were inflicted does not bolster Frank's argument that he acted in self-defense.

Matafeo further held that "[i]n certain circumstances, regardless of good or bad faith, the State may lose or destroy material evidence which is so critical to the defense as to make a criminal trial fundamentally unfair without it." 71 Haw. at 187, 787 P.2d at 673 (internal quotation marks omitted).

Photographs showing that the most severe injuries were inflicted after Malvey could not have survived are not so crucial to the defense that the absence of such photographs would result in a fundamentally unfair trial. At trial, Manoukian testified that the wounds to Malvey's scalp were inflicted at or around the time that Malvey died. The State offered photographs depicting injuries to Malvey's chin, upper lip, and lower lip -- injuries that occurred while Malvey was still alive and that were consistent with Frank's testimony that he hit Malvey, Malvey fell, Frank fell on top of Malvey, and Malvey expired immediately after falling. Manoukian testified that Malvey had a subarachnoid hemorrhage in her brain that could have occurred as a result of a fall. Manoukian testified that the injury to Malvey's liver was inflicted at or around the time of death. Frank cross-examined Manoukian.

Accordingly, the lack of pictures depicting Malvey's jaw, liver, and brain did not result in a fundamentally unfair trial.

2. Frank's Motion in Limine VII

Citing State v. Nomura, 79 Hawai'i 413, 903 P.2d 718 (App. 1995), Frank argues that the use of the words "kill," "killed," and "homicide" by the State during evidentiary portions of the trial was conclusive, misleading, argumentative and prejudicial.

In Nomura, we held that under the circumstances of that case, the use of the term "victim" in jury instructions constituted an improper comment upon the evidence by the court, prohibited by Hawai'i Rules of Evidence (HRE) Rule 1102.⁶ 79 Hawai'i at 416-17, 903 P.2d at 721-22. We noted that questions of whether the complaining witness was the object of the crime and whether she suffered abuse were matters for the jury to decide. Id. at 417, 903 P.2d at 722. However, we determined that, viewing the instructions in their entirety, use of the term "victim" was not prejudicial and thus, its use was harmless error. Id. at 418, 903 P.2d at 723.

⁶HRE Rule 1102 (1993) states:

Rule 1102 Jury instructions; comment on evidence prohibited. The court shall instruct the jury regarding the law applicable to the facts of the case, but shall not comment upon the evidence. It shall also inform the jury that they are the exclusive judges of all questions of fact and the credibility of witnesses.

The ruling in Nomura precludes only the court from referring to the complaining witness as the "victim" in its jury instructions. As the Nomura court explained, the rationale behind HRE Rule 1102 is that "judicial comment upon evidence risks placing the court in the role of an advocate." 79 Hawai'i at 417, 903 P.2d at 722. "It is essential that the presiding judge endeavor at all times to maintain an attitude of fairness and impartiality." Id. (internal quotation marks and ellipsis omitted).

That rationale does not apply here. We conclude the State's use of the terms "killed" or "homicide" was not improper.

The circuit court did not abuse its discretion in denying Frank's Motion in Limine VII.

D. Jury Instructions

Frank contends the circuit court's instruction on self-defense blurred the distinction between reasonable force and deadly force by instructing the jury that all force resulting in death is deadly force and that, therefore, reasonable force does not apply to the offense of Reckless Manslaughter.

The circuit court's jury instructions included the following explanation of the use of the defense of self-defense against the charge of Manslaughter by Reckless Conduct:

With regard to the charge of Manslaughter by Reckless Conduct, you must consider whether any evidence of self-defense exists. If you do not find any evidence of self-defense, then you may not consider these defenses. If you find evidence that self-defense exists, then you must

determine whether the State has disproven self-defense beyond a reasonable doubt. If you find that the State, A, has proven beyond a reasonable doubt the three material elements of Manslaughter by Reckless Conduct; and B, has disproven beyond a reasonable doubt the defense of self-defense as it applies to a charge of Manslaughter by Reckless Conduct, then you must return a verdict of guilty of Manslaughter by Reckless Conduct.

The circuit court then explained the defense of self-defense:

Justifiable use of force, commonly known as self-defense, is a defense to the charge of murder and to the charge of manslaughter. Once there is any evidence of self-defense, the burden is on the prosecution to prove beyond a reasonable doubt that the force used by the defendant was not justifiable.

If the prosecution does not meet this burden, then you must find the defendant not guilty. The use of force upon or toward another person is justified when a person reasonably believes that such force is immediately necessary to protect himself or herself in the present occasion against the use of unlawful force by the other person. Force means any bodily impact, restraint, or confinement, or the threat thereof. Unlawful force means force which is used without the consent of the person against whom it is directed and the use of force which constitutes an unjustifiable use of force or deadly force.

The use of force upon or toward another person is justified when a person using such force reasonably believes that deadly force is immediately necessary to protect himself or herself on the present occasion against death or serious bodily injury. Deadly force means force which the actor uses with the intent of causing or which he or she knows to create a substantial risk of causing death or serious bodily injury. The threat to cause death or serious bodily injury by the production of a weapon or otherwise, so long as the actor's intent in creating apprehension that he or she will use deadly force if necessary, does not constitute deadly force.

Bodily injury means physical pain or illness or any impairment of physical condition. Serious bodily injury means bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ. The use of deadly force is not justifiable if the defendant with the intent of causing death or serious bodily injury provoked the use of force against himself or herself in the same encounter, or if the defendant knows that he or she can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing or a person, asserting a claim of

right thereto or by complying with the demand that he abstain from any action which he has no duty to take.

Otherwise a person employing protective force may estimate the necessity thereof under the circumstances as he reasonably believes them to be where the force is used without retreating, surrendering possession, doing any other act which he has no legal duty to do or abstaining from any lawful action.

The circuit court correctly instructed the jury that the State was required to disprove self-defense beyond a reasonable doubt; explained situations where the use of force is justified; explained situations where the use of deadly force is not justifiable; and explained the use of protective force. The circuit court also explained the defense of self-defense as it applies to Manslaughter by Reckless Conduct:

The reasonableness of the defendant's belief that the use of such protective force or deadly force was immediately necessary shall be determined from the viewpoint of a reasonable person in the defendant's position under the circumstances of which the defendant was aware of it as the defendant reasonably believed them to be. Where the defendant is reckless or negligent in having a belief that he is justified in using or threatening to use force or in acquiring or failing to acquire any knowledge or belief which is material to the justifiability of his use of force, the defense of justification is unavailable for Manslaughter by Reckless Conduct.

The circuit court's instruction that "the defense of justification is unavailable for Manslaughter by Reckless Conduct," when read in context with the circuit court's instruction on the reasonableness of the defendant's belief that the use of force is necessary, was not prejudicially insufficient, erroneous, inconsistent or misleading.

IV. CONCLUSION

For the foregoing reasons, the September 26, 2000,
Judgment of the Circuit Court of the Third Circuit is affirmed.

DATED: Honolulu, Hawai'i, February 28, 2002.

On the briefs:

Michael M. McPherson
for defendant-appellant.

Chief Judge

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Associate Judge

Associate Judge